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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. ~~771~~ 68 (see No. 93)

LESTER E. BANNING,
Petitioner,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Lester E. Banning respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 5, 1949.

A.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 5, 1949 (R. 405). The jurisdiction of this court is invoked under Section 1254(1) of Title 28 United States Code as enacted by the 80th Congress—Second Session, 1948, effective on September 1, 1948.

B.

Statement of the Matter Involved.

This case involves a suit for damages instituted under the provision of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, *et seq.*, by Lester E. Banning, employed by the Detroit, Toledo & Ironton Railroad Company as a brakeman or switchman, for injuries sustained by him while engaged in the performance of his duties in the defendant's railroad yards in Trenton, Michigan, which he alleges resulted from the negligence of the railroad company.

The Court of Appeals has found that the evidence warrants the inference that the accident occurred under the following circumstances:

Appellee Banning was employed by the Appellant in July, 1945 as a brakeman. At the time of the accident on September 23, 1946, he was working as a member of a switching crew which was making up a freight train. It had been raining all day. During the evening, the crew took a Diesel engine into a siding leading to a gravel quarry and picked up about 8 gondola cars loaded with gravel. The engine backed out of the siding, temporarily dropped the gondola cars and continued backward into another siding behind a distillery to pick up two box cars.

Banning performed the coupling in this operation. In doing so he alighted from the engine and walked around on the road bed. At this point there was a thin layer of mud about two inches thick and Banning got mud on his boots. The crew worked on this siding for about 15 minutes. After coupling the cars, Banning got upon the engine and stayed there about 3 or 4 minutes before it pulled out. He was in a position where he could talk to the engineer and fireman. He was not on the ground again in that area.

The engine pulled the two box cars back to the location of the gondola cars where it again coupled with them. Banning made this coupling, but the ground was solid road bed with no mud. The engine then continued its backward course to the south, out of the quarry siding, into the main line, pushing the two cars from the distillery and pulling the cars from the quarry. The cars from the quarry were then cut off and left standing with brakes locked. The engine continued backing southwardly down the main line pushing the two cars to a point about 1,000 feet to the south of where it had left the other cars standing. Then the crew proceeded to make a drop or a flying switch in the following manner: The engine started northward pulling the two cars toward the standing cars and got up a speed of 12 to 14 miles per hour. It then slowed down and created a slack between it and the two cars which were uncoupled from the engine. The engine then speeded up and passed over a switch leading from the main line down a dead end siding. After the engine went off into the siding the switch was immediately thrown back so that the free running cars following the engine passed on and continued down the main line. They would thus run into and become coupled to the standing cars from the quarry, eliminating the en-

gine from the middle. The combined cars were to be then pushed to the yards.

Banning was then on the front end of the box car nearest the engine. He uncoupled the cars from the engine when the engine created slack. He then climbed a ladder on the moving car to a brake platform where it was his duty to operate the hand brake in order to control the speed of the box cars and slow them down so that they would make an easy contact and an automatic coupling with the standing cars. Banning claims that although he continuously applied the brake the cars had been pushed at such a speed that he only succeeeded in slowing them to a speed of six or seven miles per hour when they hit the standing cars, and that the resulting impact and crash threw him off the brake platform on to the gravel car and then down on to the road bed. At the time of the collision he was standing on the platform with a firm foothold and with both hands on the brake wheel. He described the impact as having jerked his hands and feet loose. The accident occurred about 8:00 P. M. There was a misting or light rain at the time. Banning received injuries to his back.

At the close of all the evidence the Appellant moved for a directed verdict. The Court reserved decision on the motion and submitted the case to the jury. The jury found for the appellee in the sum of $41,000.00. Appellant's motions for judgment *non obstante veredicto* and for a new trial were overruled and judgment was entered on the verdict.

The complaint filed by Petitioner contained both general and specific allegations of negligence (R1-Amended R13-15. *The complaint was amended only to aver that petitioner slipped from the braking platform of the car instead of, as originally alleged, from a ladder rung on the*

end of the car), the third paragraph was based generally on the theory that respondent failed to furnish petitioner a reasonably safe place in which to work and recited in substance that respondent failed in its duty to petitioner by causing him to perform switching operations and work upon the ground where it was muddy, wet and slippery so that his boots became immersed and covered with slippery, greasy mud, as a result of which petitioner's feet were caused to slip from the braking platform of a box car when said box car came in violent and unusual collision with a standing car, causing plaintiff to be thrown from his position on said car to the ground and injured. Following this general allegation of negligence (R. 3) the complaint alleges several particular acts of negligence upon which there was no proof, save the natural inferences to be drawn from the evidence generally, except as to the violent collision and the muddy condition of the ground and petitioner's boots.

Petitioner's evidence that he was required to work in slippery mud for about 15 minutes on the "distillery switch" and that his boots were covered with mud when he mounted the braking platform which was wet; that along the main track there was no mud as the pathway was covered with gravel and cinders, and that it was a rainy, misty night; that in falling, petitioner first struck the end of a gondola loaded with gravel and bounced from there to the ground; that petitioner sustained a fracture of the 8th, 9th, 11th and 12th dorsal vertebrae and that between the 10th and 11th and the 11th and 12th dorsal vertebrae there was alteration of the space of the inter-vertebrial space was uncontroverted. The evidence as to other circumstances tended to show that petitioner was dislodged from the braking platform when the box car he was riding, which was then travelling 6

to 7 miles per hour, came in collision with cars standing on the main line loaded with gravel and with the brakes set. The case was submitted to the jury by the District Court on the question of negligence on the part of the railroad and contributory negligence on the part of petitioner (R. 329-343), resulting in a verdict in favor of plaintiff (R. 349). The Court overruled a motion of respondent to set aside the verdict and entered judgment for plaintiff (R. 390).

On appeal the Court of Appeals for the Sixth Circuit reversed the decision of the District Court and ordered the case remanded for a new trial, holding:

> "• • • Whether the crash contact was the result of excessive speed, or caused by Banning's failure to properly use the braking mechanism, presented a disputed question of fact. The District Judge was correct in submitting this issue to the jury",

but held:

> "The evidence respecting whether the Appellant was negligent in requiring Banning to work under muddy conditions resulting in muddy boots which caused him to slip and fall from the braking platform was not sufficient to take that issue to the jury. • • • Nor does the evidence show in any way that Appellee was required to work thereafter without being afforded the opportunity to counteract any danger resulting therefrom. He had ample opportunity while waiting on the engine to clean his boots of mud. • • • Only the issue of excessive speed should have been so submitted. The verdict rendered by the jury was a general one with no way to determine on which of the two issues it was based." The Court further stated: "Appellee invokes the 'unitary rule of negligence' to justify the submission of the mud issue, contending that the mud, rain, wet braking platform and speed of the cars

formed one continuous chain of circumstances which led to his injury. The case could have been presented and properly submitted to the jury in that manner" (R. 410).

The Court further stated that the two incidents were entirely separate and distinct and the Judge erred in submitting both to the jury and that the Appellant is entitled to a new trial.

The part of the instructions of the District Court which was criticized by the Court of Appeals, is in substance (R. 331):

Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work, in two respects; first, that he was required to work in the yard in muddy conditions so that his boots became slippery and covered with mud; and second, that defendant dropped the car upon which plaintiff was riding in the performance of his duties at such a high, dangerous and excessive rate of speed that plaintiff did not have the opportunity to bring it to a stop by means of the braking apparatus * * * that unless you find the defendant was negligent in one or the other respects as claimed by the plaintiff, you should find for the defendant.

The Court of Appeals further held that there was sufficient evidence to show that plaintiff was injured when knocked from the brake platform due to the violent collision.

C.

Questions Presented.

1. Whether a general verdict should be upheld in a case involving two or more issues or theories, when one issue or theory has been properly submitted to the jury and is sustained by the evidence.

2. Whether or not, under the circumstances, there was sufficient evidence, together with the natural inferences flowing therefrom, to justify the submission of the question to the jury on the hypothesis that the muddy condition in which petitioner was compelled to work could or might have contributed to his dislodgement from the braking platform.

3. Whether there was sufficient evidence of a causal connection between the slippery mud on petitioner's boots, the wet braking platform, the violent collision resulting in injury to petitioner to justify submission of that question to the jury over defendant's objections under the "unitary rule of negligence."

D.

Reasons Relied On for Allowance of Writ.

1. The United States Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decision of other Court of Appeals on the same matter, and a decision in conflict with a decision of this Court, namely: that a general verdict should be upheld in a case in which there are two or more issues or theories when one issue or theory has been properly submitted to the jury and is sustained by the evidence if, in the opinion of the Court, another issue or theory has been improperly submitted to the jury and should have been withdrawn.

2. That there was sufficient evidence, taking into consideration the surrounding circumstances and the natural inferences flowing therefrom, for the jury to have found that the muddy conditions contributed to petitioner's dislodgment from the wet braking platform and contributed to his injury.

3. That the evidence on the whole, including the natural inference to be drawn therefrom, showed a chain of circumstances which proximately caused and contributed to petitioner's injury.

A supporting brief accompanies this petition.

Wherefore, petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered by that Court in this case on April 5, 1949, and that said order be reversed by this honorable Court and that your petitioner may have such other and further relief as may be deemed proper by this honorable Court.

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OCTOBER TERM, 1948.

No.

LESTER E. BANNING,
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vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the United States Court of Appeals, Sixth Circuit (R. 405), decided April 5, 1949, is still unreported. Memorandum of grounds for denial of motion for a new trial of the District Court of the United

States for the Eastern District of Michigan, Southern Division, filed March 24, 1948 (R. 382).

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 1254(1) of Title 28 U.S.C.A. as enacted by the 80th Congress—Second Session, 1948, effective on September 1, 1948. The judgment of the United States Court of Appeals, Sixth Circuit, to be reviewed was entered on April 5, 1949 (R. 405).

III.

Statement of the Case.

A statement of the case appears under heading "B", page 2 of the petition for writ of certiorari. We feel it is not necessary to repeat, but the same is referred to with the request that it be considered as herein incorporated by reference.

IV.

Questions Presented.

The questions specifically presented by the petition for writ of certiorari appear under heading "C", page 7 of the petition, and in the interest of brevity, they are not repeated, but are referred to with the request they be herein incorporated by reference.

V.

ARGUMENT.

Summary of Argument.

1. The United States Court of Appeals for the Sixth Circuit held that the evidence in this case is sufficient to support the verdict of the jury on one issue which was properly submitted. The verdict should, therefore, be upheld even though another issue may have been improperly submitted.

2. The issue relating to the slippery, muddy roadbed upon which petitioner was required to work was properly submitted to the jury and was sufficient evidence to sustain a verdict founded thereon.

3. There was sufficient evidence to show a causal connection between the slippery mud on petitioner's boots, the wet braking platform, the violent collision and petitioner's injury.

1. The Verdict of the Jury Should Be Upheld on Issues Properly Submitted.

The Court of Appeals concedes that the evidence produced at the trial of this case was sufficient to sustain a verdict of negligence against the defendant as to the violent collision between the car upon which petitioner was riding and the standing cars on the main line track, and concedes that the issue raised by this evidence was properly submitted to the jury and indicates that had no other issue been raised it would have affirmed the judgment. The Court of Appeals also holds that had the question of the violent collision, the muddy conditions

of the roadbed and petitioner's boots, been submitted to the jury in one bundle it would have affirmed the judgment. It holds, however, that because the petitioner alleged that defendant failed to furnish petitioner a reasonably safe place in which to work *"in two respects"* the judgment must be reversed, because there was no causal connection between the muddy roadbed, the muddy boots, the wet braking platform, the collision and petitioner's injury; that the issue of the muddy boots was improperly submitted to the jury and the general verdict could not be upheld, as it was impossible to say whether it was based upon the issue properly submitted or upon the issue that should have been withdrawn.

We concede that until recently there has been a decided conflict of authority upon the question as to whether error affecting only one of two or more issues is prejudicial. We respectfully submit that this Court, in recent cases, has approved the doctrine that, if one issue or theory is properly submitted to the jury and is sustained by evidence, a general verdict should be upheld even though another issue may have been improperly submitted. In the case of *Bigelow* v. *R.K.O. Radio Pictures,* 327 (U. S.) 251, 66 (S. Ct.) 574, in reversing a judgment of the Court of Appeals, based upon a general verdict where two theories of damages were submitted to the jury, said on page 259:

> "In submitting the two classes of evidence of damage which we have detailed, the trial court stated to the jury:
>
> 'Plaintiffs seek to recover damages for the alleged acts of the defendants on one of two theories' * * * 'If plaintiffs have been injured by the alleged acts of the defendants, they must choose one or the other of the said two theories of determining damages or the amount of damage.'"

and on page 266 this Court further said:

> "We conclude that there was evidence to support a verdict for damages on at least one theory on which the case was submitted to the jury. We do not imply the verdict could not be supported by some other theory."

That this rule has become generally recognized as the law is further evidenced by the decision of the Court of Appeals, 7th Circuit, in the case of *Larsen* v. *Chicago & N. W. Ry. Co.*, 171 Fed. 2nd 841, an action brought under the Federal Employers' Liability Act. The principal question in that case was whether there was sufficient evidence to support a jury verdict in either of the two charges of negligence on which the defendant was found guilty and the court held that but "one charge of negligence is sufficient to sustain a verdict," citing *Miller* v. *Advance Transportation Company*, 7 Cir., 126 F. 2nd 442, 446, certiorari denied, 63 S. Ct. 32, 317 U. S. 641.

Prior to the recent cases above cited this Court apparently gave tacit approval to the doctrine that if one issue is properly submitted to the jury and is sustained by the evidence, a general verdict should be upheld even though another issue may be improperly submitted, *Tiller* v. *Atlantic Coast Line Ry. Co.*, 323 U. S. 574, 65 S. Ct. 421; *Cross* v. *Ryan* (C.C.A. 7th, 1941), 124 F. 2d 83, certiorari denied (1942), 316 U. S. 682, 62 S. Ct. 1269, 86 L. Ed. 1755; *Miller* v. *Advance Transp. Co.* (C.C.A. 7th, 1942), 126 F. 2d 442, certiorari denied (1942), 317 U. S. 641, 63 S. Ct. 32, 87 L. Ed. 516.

Applying this rule to the instant case, in which the Court of Appeals concedes the evidence presented was sufficient to justify the submission of the question of negligence to the jury, the general verdict should be upheld even though, as determined by the Court of Appeals, the other issue may have been improperly submitted.

2. Issue Involving Muddy Condition Where Petitioner Was Required to Work.

That there was substantial evidence of mud is entirely undisputed. The plaintiff in the performance of his duties had been necessarily wading in mud on the back track (R. 34) and here was mud on his feet at the time he mounted to the brake platform (R. 53). It was rainy and misty at the time of the occurrence and the braking platform was wet. Along the main line there was no mud. The roadbed was paved with gravel and cinders (R. 36). These facts were undisputed. We submit from this evidence, the jury had a right to reasonably reach the inference that if the defendant could provide petitioner with a solid roadbed of gravel and cinders along the main line that it could also have furnished him a solid roadbed upon which to perform his duties on the back track, and, in that respect, defendant was negligent; and the further natural and reasonable inference that the muddy, slippery condition of petitioner's boots contributed to his losing his footing on the braking platform and could have added to plaintiff's danger. If petitioner did have time and opportunity to clean the mud from his boots as suggested by the Court of Appeals that fact was presented to the jury and considered by them and went only to his contributory negligence, if any.

In the case of *Tennant* v. *Peoria & T. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, this court said on page 35:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It

weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (cases cited). That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the case of *Lavender* v. *Kurn,* 327 U. S. 645, 66 S. Ct. 740, this court said on page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The above rule of law was also followed by this Court in *Ellis* v. *Union Pac. R. Co.,* 329 U. S. 649, 67 S. Ct. 598. This principle of law was also enunciated in the case of *L. & N. R. Co.* v. *Botts,* decided on March 14, 1949, 173 F. 2nd 164 by the Court of Appeals for the Eighth Circuit. In this case the Court very ably and exhaustively

reviewed the important cases on the subject and finally rendered a decision which appears to us to be contrary to the opinion of the Circuit Court in the case at bar.

We strongly feel that in view of the foregoing rule of law the Court of Appeals should have affirmed petitioner's judgment.

3. Negligence of the Defendant Should Be Determined By Viewing Its Conduct As a Whole.

Briefly, what occurred just prior to petitioner's injury was that after they reached Trenton, defendant did some switching leaving 8 or 10 gondolas loaded with gravel on the main track with the brakes set, then they proceeded to switch two cars from the back track where plaintiff was required to get on the ground and walk in the mud, two inches of slushy mud (R. 34) in assisting in picking up these two cars. Plaintiff charged that he was on the back track about 15 minutes. He then mounted the stirrup of the car next to the engine and they pulled out on the main track which placed the diesel locomotive between the two cars it had hold of and the gravel cars on the main line. In order to get the locomotive on the end of the train, it was necessary to make a drop or flying switch of the two cars which was done according to the evidence by getting up a speed of around 12 miles per hour, then slacking off enough to allow petitioner, who had been riding the stirrup of the car next to the locomotive, to uncouple the two cars from the locomotive which was then run in on a siding and the switch closed before the two cars on which plaintiff was riding reached the switch so that those two cars would go down the main line and contact the standing gravel cars. After plaintiff had uncoupled the locomotive, he proceeded up the ladder to the braking platform where he applied the brakes in an

attempt to stop the cars before contacting the standing cars but was unable to do so, as a result of which the two cars on which plaintiff was riding struck the standing gravel cars when going at a speed of 6 to 7 miles per hour and plaintiff was knocked from the platform, landed on his back on the edge of the gravel car, bounced from there to the ground where he landed on his back and was injured. Inasmuch as the Court of Appeals concedes that there was sufficient evidence to go to the jury on the question of the rough handling of the two cars, we will not take the Court's time to go into the details of the evidence in that respect.

Petitioner contends that there was sufficient evidence to show a causal connection between the slippery, muddy roadbed upon which petitioner was required to work, the wet braking platform and the violent collision; that the above events and the natural inferences to be drawn therefrom, constitute one continuous chain of events leading to petitioner's injury. In the case of *Blair* v. *B. & O. Ry. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945), this Court said on page 604:

> "We think that there was sufficient evidence to submit to the jury the question of negligence posed by the company. The duty of the employer 'becomes more imperative as the risk increases.' The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific Ry. Co.* v. *Hadley*, 246 U. S. 330, 332, 333; 38 S. Ct. 318, 319; 62 L. Ed. 751. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern and each impart character to the others. * * * Consequently, we think the jury, and not the court, should finally determine the issues."

In the case of *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 63 S. Ct. 1062, this Court said on page 353:

"The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co., supra*) as well as issues involving controverted evidence. (*Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235. To withdraw such a question from the jury is to usurp its function.

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' *Jacob* v. *New York City*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. * * *To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In the case of *Wilkerson* v. *McCarthy, et al.*, decided by this Court on January 31, 1949, ... U. S. ....., 69 S. Ct. 413, this court held on page 418:

"In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate

stands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence."

In the case of *Coray* v. *Southern Pac. Co.*, decided by this court on January 3, 1949, ... U. S. ....., 69 S. Ct. 275, which was an action brought under the provisions of the Safety Appliance Act and the Federal Employers' Liability Act this court in reversing and remanding the judgment of the State Supreme Court of Utah, held on page 277:

> "These air brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction, crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

Under the rule of law laid down in these cases we seriously contend that the circumstances leading up to plaintiff's injury from the time he was compelled to wade in the sloppy, slippery mud until he was thrown from the braking platform and injured formed one continuous chain of circumstances so closely interwoven as to form a single pattern and that each imparted character to the other, and that this cause was properly submitted to the jury by the District Court.

Conclusion.

In conclusion, counsel for the petitioner respectfully submit, for the reasons herein set out, a writ of certiorari should be granted the petitioner and that this court should review and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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